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SOUTHERN RY. CO. v. OLIVER.

June 16, 1904.

MASTER AND SERVANT—PERSONAL INJURIES—INSTRUCTIONS—EVIDENCE—
HARMLESS ERROR—SPECIAL JURY—VERDICT—EXCESSIVENESS.

1. Under Code 1887, section 3158, authorizing a special jury, the discretion of the trial court in refusing one cannot be interfered with on appeal, where there was no showing, in support of the request, that the facts alleged therein were true, and it is not made to appear on appeal that any prejudice resulted from the refusal.

2. In an action against a railroad company for injuries to a brakeman caused by the collision of an incoming train with the train under which plaintiff was working in a switchyard, the evidence showed that a fellow servant of plaintiff had been sent out by order of the yard conductor to flag an incoming train, and had done so, returning on the train. The rules of the railroad company required brakeman sent out under such circumstances to stay out until recalled by the yard whistle, and provided that the brakeman must be instructed in the rules, furnished with time-tables, and carry watches, but there was evidence that the brakeman who went out to flag the incoming train had not been instructed in the rules and carried no watch, and that the rule as to remaining out until recalled did not apply to yard brakemen. When this brakeman returned he was seen by the yard conductor and put to work by him on the same train under which plaintiff was working at the time he was injured. *Held*, that there was sufficient basis in the evidence for an instruction that, if the yard conductor could have known by reasonable diligence that the brakeman had returned without flagging the train which injured plaintiff in time to have had that train flagged, they should find for plaintiff.

3. In reviewing the evidence to determine whether it affords sufficient basis for an instruction, it is not to be considered as upon a demurrer to the evidence, but the question is whether there is evidence upon which to rest the instruction, or to which it is referable.

4. When it clearly appears from a consideration of the instructions as a whole that the jury could not have been misled by them, the judgment should not be reversed, though as abstract propositions they may not accurately state the law.

5. Where it can be seen from the whole record that, even under instructions in all respects correct, a different verdict could not have been rightly found, the court will not reverse the judgment for error in instructions.

6. In an action against a railroad company for personal injuries, a juror is not disqualified by reason of the fact that he has a claim against the company for personal injuries, which he intends to prosecute.

7. A negro brakeman 24 years of age, strong, healthy and industrious, in the line of promotion, having a wife and two children to support, and earning from \$1 to \$1.50 a day, was injured so as to necessitate the amputation of a foot. *Held*, that a verdict for \$5,000 was not excessive.